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IN THE

Supreme Court of the United States

(OCTOBER TERM, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE APPELLANT.

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SUBJECT INDEX.

	Page
Jurisdiction	2
Statement:	
The question involved and the proceedings in the trial court and Supreme Court of Illinois	2
The facts	3
Comparative Summary of Federal and Illinois Statutes	7
Specification of Errors Relied on	14
Summary of Argument	15
Argument:	
I. The Shipment of farm produce from outside the State of Illinois on consignment to the Cross Company in Illinois, as well as the sales of those goods on behalf of the owner, were all transactions constituting interstate commerce. And the part played by the commission merchant in that transaction is so important and vital in and of itself that the attempt to regulate it by this state statute imposes a direct and substantial burden on interstate commerce, and is therefore void	18
II. The action of Congress in regulating and licensing the business of commission merchants engaged in interstate shipments is a conclusive showing that the functions performed by a commission merchant is an essential part of the interstate commerce transaction. Hence the state act undertaking to license those functions is a direct burden on the interstate commerce transaction, and is void	31
III. Congress having undertaken to license and regulate the business of commission merchants handling perishable agricultural commodities in interstate commerce, any state statute attempting to do the same is unconstitutional and void under the commerce clause of the constitution	37

IV. The provisions of the commission merchants act under which this bond was exacted must be regarded as though they were incorporated in the bond. That act being unconstitutional and void, the bond is void and unenforceable as against the surety as well as the principal..... 46

Illinois Statute.....Appendix A

Federal Statute.....Appendix B

CASES CITED.

Baldwin v. G. A. F. Seelig, 294 U. S. 511..... 21

Bedford Company v. Stone Cutters Association, 274 U. S. 37..... 20

Brown v. Maryland, 12 Wheaton 419, 25 U. S. 554..... 27

Chicago Board of Trade v. Olsen, 262 U. S. 1..... 33

Constable v. National Steamship Company, 154 U. S. 51, 77 49

Corson v. Maryland, 120 U. S. 502..... 26

Crutcher v. Kentucky, 141 U. S. 47..... 25

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 24

Di Santo v. Pennsylvania, 273 U. S. 34..... 23

Estate of Ramsey v. People, 197 Ill. 572..... 46

Federal Trade Commission v. Pacific Paper Assn., 273 U. S. 52..... 25

Furst v. Brewster, 282 U. S. 493..... 25

Hall v. Geiger-Jones, 242 U. S. 539..... 43

Hopkins v. United States, 171 U. S. 578..... 18

Lemke v. Farmers Grain Co. 258 U. S. 50..... 26

Local 167, International Brotherhood of Teamsters, etc. v. United States, 291 U. S. 293..... 29

Minnesota v. Blasins, 290 U. S. 1 27
Mintz v. Baldwin, 289 U. S. 346 42
Moses v. United States, 166 U. S. 571 49
Napier v. Atlantic Coast Line, 272 U. S. 605 40
Oregon-Washington Co. v. Washington, 270 U. S. 87 37
Paul v. Virginia Insurance, 8 Wall. 168 33
Pennsylvania Railroad v. Public Service Commission, 250 U. S. 566 38
People v. Beekman & Co. 347 Ill. 92 48
People v. Federal Surety Co. 336 Ill. 472 46
Real Silk Hosiery Mills v. Portland, 268 U. S. 325 23
Robbins v. Shelby County Taxing District, 120 U. S. 489 26
Sanitary District v. United States, 266 U. S. 405 38
Savage v. Jones, 225 U. S. 501 43
Schechter Poultry Corporation v. United States, 295 U. S. 495 28
Shafer v. Farmers Grain Co. 268 U. S. 189 34
Sligh v. Kirkwood, 237 U. S. 52 43
Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439 38
Stafford v. Wallace, 258 U. S. 495 ..... 20, 32
Stockard v. Morgan, 185 U. S. 27 20
Texas Transportation Co. v. New Orleans, 264 U. S. 150 22
Ware and Leland v. Mobile County, 209 U. S. 405 33
50 Corpus Juris 74 49
Childs on Suretyship 49

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BRIEF FOR THE APPELLANT.

STATEMENT.

Jurisdiction.

This is an appeal from the Supreme Court of Illinois, the highest court of that state. It is a consolidation of two cases (R. 11, 30) tried as one in the Municipal Court of Chicago, and so heard on appeal. The trial was before the court without a jury upon a stipulation of facts. (R. 12.)

The opinion of the Supreme Court is published as follows: *People ex rel.* v. *G. H. Cross Company, et al.*, 361 Ill.

405; 198 N. E. 356. It is also to be found, at pages 31 to 42 of the printed record.

A statement as to jurisdiction in accordance with Rule 12 of this court was duly filed, and an order entered postponing further consideration of that question to the hearing of the case on its merits. The appeal involves the sole question whether an act of the legislature of the State of Illinois, as interpreted and applied by the Supreme Court of that state, is violative of the commerce clause of the federal constitution. Hence the jurisdiction of this court is invoked by virtue of Section 237 of the Judicial Code as amended (28 U. S. C. A., Sec. 344), the Act of January 31, 1928 (Chap. 14, 45 Stat. 64; 28 U. S. C. A. sec. 861 (a)) abolishing writ of error, etc., and the Act of April 26, 1928 (Chap. 440; 45 Stat. 466; 28 U. S. C. A., sec. 861 (b)).

The constitutional questions were raised by the defendant upon its first appearance in court in its affidavits of meritorious defense filed in accordance with the practice of Illinois (Pars. 6, 7, 8 of the Affidavits, R. 5, 6, 24, 25). The same questions were raised in the amended affidavits of merits upon which the cause went to trial (Pars. 6, 7, 8, 9 and 10, R. 8, 9, 10, 26, 27, 28), and also, in effect under the practice of Illinois, at the conclusion of the trial by the defendant's motion for a finding in its favor, which was denied, and by the plaintiff's motion for a finding in his favor, which was allowed. (Record below, 75.)

The validity of a statute being involved the appeal was taken as directed by the Illinois constitution (Art. VI, Sec. 11) not to the intermediate Appellate Court, but directly to the Supreme Court of the state. In that connection the trial judge certified that there was involved the validity of the Illinois statute under the constitutions of the State of Illinois and the United States. (Record below, 76.)

The Constitutional Question.

The Illinois statute complained of undertakes (as we will later show in detail) to license and regulate in Illinois the business of commission merchants handling shipments of farm produce. Nothing is said in the act as to whether the shipments contemplated are intrastate only or interstate also. The statute merely uses the phrase "within the State" as to the business regulated.

Anyone without such a license issued by the state authorities is prohibited by the statute from engaging in that business. And everyone licensed and so engaged is required to conduct his business in accordance with the regulations of the statute and the state authorities acting under it. The license covers the period of a year. As an essential requisite to its issuance the applicant must furnish a bond for the same period conditioned upon an honest accounting and handling of the produce involved.

A federal statute similarly undertakes (as we will later show in detail) to license and regulate the business of commission merchants handling "perishable agricultural commodities, in interstate * * * commerce." Under that act anyone without such a license issued by the federal authorities is prohibited from engaging in that business. And everyone licensed and so engaged is required to conduct his business in accordance with the regulation of the statute and the federal authorities acting under it.

The G. H. Cross Company, hereinafter referred to as the Cross Company, was a corporation of the State of Illinois, located in Chicago, and engaged in the business of handling farm produce and perishable farm commodities on consignment and on commission. (Par. 1 of Stip. of Facts, R. 13.) It was engaged largely in interstate business, but also had some intrastate business. Ninety-five per

cent of the total shipments were solicited and originated without and were shipped into the State of Illinois, and less than five per cent originated in Illinois. (Par. 2 of Stip., R. 13, 14.)

All of the produce received and handled by the Cross Company was consigned to it, remained the property of the consignors until sold, and was sold in the original packages as received from the consignors. No consignments were purchased by the Cross Company for its own account and resold by it. (Pars. 1 and 2 of Stip., R. 13.)

The Illinois state authorities interpreted the Illinois statute, not merely to regulate or require the licensing of the commission merchant business carried on entirely within the State of Illinois, but to regulate and license the business of any commission merchant located in the state in soliciting, receiving and handling on consignment and commission farm produce to be shipped in, and actually shipped in, from outside the State of Illinois. And even if a commission merchant were engaged solely and exclusively in soliciting, receiving and handling on consignment and commission farm produce shipped in from outside the state, state authorities insisted the act was mandatory that such a person secure a bond and license under the state statute before engaging in that business, and that in carrying on the business he submit to the regulations stipulated by the statute. Otherwise he would be subject to prosecution. (Stip., pars. 4, 5, R. 14.)

Accordingly the Cross Company was compelled by the force of the Illinois statute to apply for and secure a license to cover its business both interstate and intrastate; and in connection with that application was compelled to secure and deliver a surety bond in the amount of $5,000.

The bond uses no language either to cover or exclude interstate shipments, other than the general language pur-

porting to cover shipments which the Cross Company was about to be licensed to handle under the Illinois Act. The condition of this bond was that the Cross Company would honestly account for and handle all the produce received, and make payment to the consignors of all moneys received for the goods consigned to the principal for sale, and indemnify the consignors from and against all fraudulent acts of the principal in the sale or handling of the goods of the consignors, and keep, perform and abide by all the terms, conditions and provisions of the Illinois Act, and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance of the act. (R. 4.)

The Hartford Accident & Indemnity Company (for brevity here referred to as the Hartford) for a consideration executed bonds for $5,000 each for two successive years. (R. 4, 22, Stip. of Facts, R. 14.)

The Cross Company was also obliged by the force of the federal statute to apply for and secure a federal license from the Secretary of Agriculture in order to pursue the business of handling shipments of farm produce originating from outside the State of Illinois. (Stip. of Facts, 13. R. 16.)

In October 1932, the Cross Company became bankrupt and failed to account for a great many shipments of farm produce sent into Chicago on consignment. (Stip. of Facts, 9, 10, R. 15.) The shipments were all of fresh fruits and vegetables (Stip. of Facts, par. 10, R. 15, 3, 20, 21), that is to say of a kind of commodity which is specifically covered by both the state and federal acts. Some of the shipments were from Illinois but most of them from other states.

Thereupon the state authorities, persisting in their construction that the Illinois statute applied to interstate as well as intrastate business, brought the two suits on the

two bonds in question in this case against the Hartford and the Cross Company to recover for such shipments not accounted for.

The suit on the first bond covering the period from the 1st of July, 1931, to the 1st of July, 1932 (R. 2, 4, 14), sought to recover on account of a single shipment consisting of a car load of apples shipped in from the State of Washington by a resident of that state on consignment to the Cross Company at Chicago. (R. 3, 15, 16.)

The suit on the second bond, covering a period from the 1st of July, 1932, to the 1st of July, 1933 (R. 14, 18), was brought to recover on a great number of shipments of fruit and vegetables from various persons in several parts of the country, but mostly out of the State of Illinois. Eleven of the shipments were from Illinois, and ninety-two from without. In dollars, about $380 represented Illinois shipments and about $13,500, shipments from without the state. (R. 20, 21.)

In both of these suits, so far as the controversy here is concerned, the Hartford, acting within its rights as will later be shown, challenged the Illinois statute as so construed, and the bond exacted under it; and maintained that the State Act was unconstitutional as violative of the commerce clause of the federal constitution in so far as it licensed and regulated or was construed to license and regulate interstate shipments of farm produce, and in so far as the bond purported to cover or was construed to cover such shipments. The contention being that Article 1, Section 8, clause 3 of the federal constitution, the commerce clause, was violated, in that the act as so construed was a restriction and burden upon and a regulation of interstate commerce (R. 6, 9, pars. 6; R. 25, 27, pars. 6, 8), and also in that Congress had prior to the application for the license and issuance of the bond enacted the legislation

above referred to and entitled "The Perishable Agricultural Commodities Act of 1930" (46 Stat. 531) covering consignment shipments of perishable commodities in interstate commerce, which was the same subject matter as that of the Illinois Act. (R. 7, par. 8; R. 10, par. 10; R. 25, par. 8; R. 28, par. 8.)

The trial court held the act valid as interpreted by the state authorities to apply to interstate shipments, and accordingly that the bonds were valid also, and covered the same shipments. A judgment was rendered for the full amount of the shipment in the first case (R. 12), and for the full penalty of the bond in the second. (R. 30.)

The federal and the Illinois statutes.

A full copy of the Illinois act, the validity of which is involved is attached hereto as Appendix "A", and also a full copy of the Federal Act (46 Stat. 531; 7 U. S. C. A. 499 (a) *et seq.*) is attached as Appendix "B".

It is to be noted that the Federal Act referred to in the opinion of Mr. Justice Wilson of the Supreme Court of Illinois is not the Federal Act which the appellant has pointed to in this connection. The act Mr. Justice Wilson points to (361 Ill. 405, 411, 412) (R. 35, 36) is Chap. 20, Title 7, Sec. 491, *et seq.* (which is 44 Stat. 1355) whereas the act pleaded in the Affidavits of Merits is 46 Stat. 531 (R. 7, 10, 25, 29, Stip. of Facts, par. 13, R. 16.) The U. S. C. A. reference to this act is Title 7, Chapter 20A, pars. 499 (a) *et seq.*

As the subjects dealt with by the two acts present a question of basic importance in this matter, we submit the following comparative summary of their various licensing and regulating provisions with reference to the business they purport to regulate and control.

The titles to the two acts:

The State Act is entitled "An Act to Regulate the Consignment and Sale on Commission of Farm Produce."

The Federal Act is entitled "An Act to Suppress Unfair and Fraudulent Practices in the Marketing of Perishable Agricultural Commodities in Interstate and Foreign Commerce."

With reference to the persons and business covered:

The State Act, paragraph 1, defines a commission merchant as one licensed under the act to receive, sell or offer for sale on commission "within this State" any kind of farm produce.

The Federal Act, Section 1, paragraph 5, defines a commission merchant as one engaged in the business of receiving in interstate commerce any perishable agricultural commodity for sale on commission. It stipulates in subparagraph 8, that a transaction in any perishable agricultural commodity shall be considered in interstate or foreign commerce if the commodity is a part of that current of commerce usual in the trade in that commodity, whereby such commodity and other products of such commodity are sent from one state, with the expectation that they will end their transit, after purchase, in another.

With reference to the produce dealt in by the business licensed and regulated:

The State Act, Section 1, paragraph 1 (b) defines farm produce to include practically everything of that general nature.

The Federal Act, subparagraph 4, defines perishable agricultural commodities as fresh fruits and fresh vegetables of every kind and character.

As to the license:

The State Act, Section 2, prohibits any one from entering into business as a commission merchant without a license. It provides:

> "No person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit, consignments or shipments for sale on commission *within this State* any kind of farm produce, without a license as provided in this Act." (Italics ours.)

It requires a person or corporation seeking a license to apply to the State Director of Agriculture and in his application to state the kinds of farm produce he proposes to handle, the name he proposes to use, and if a firm the name of the officers, and the name of the local agent, address, etc., and that

> "such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business."

It is then provided that the Director of Agriculture shall issue the license upon the payment of ten dollars *and the execution and delivery of a bond* as later provided for. The license permits the applicant to conduct a commission business at the place named until the succeeding first of July. *Separate licenses and bonds are required for each location.* The license must be posted in the office of the commission merchant. The bond required by paragraph 3 is in the amount of $5,000 and conditioned on an honest accounting and handling of the produce received and against fraudulent acts.

The Federal Act, Section 3, prohibits any person at any time from carrying on the business of a commission merchant in interstate commerce without a license. The application for such a license is to be made to the Secretary of Agriculture under regulations provided by him as to the

information to be given, etc. Only a single license is required and its term is as long as the annual fees of $10 each year are paid or until canceled for cause.

As to the granting and revoking of a license:

The State Act provides, Section 5, that the Director may refuse to grant a license or revoke one already granted "where he is satisfied of the existence of the following cases, or any of them." Then follows a list of cases, including: false charging; failure to account promptly; false statements as to condition, quality and quantity of goods received; false or misleading statements as to market conditions; combinations to fix prices; where the commission merchant directly or indirectly purchases goods for his own account without authority; where the commission merchant is in bankruptcy, or the Director believes that bankruptcy may shortly occur; where a continued course of dealing is of such a nature as to satisfy the Director of the inability of the licensee to properly conduct the business of a commission merchant; where there is shown intent to deceive or defraud shippers; where there has been fraud or deception in obtaining the license; or where a new bond is not filed when the old one is held to be unsatisfactory.

The Federal Act, Section 4 (a), provides for the issuance of the license and 4 (b) for a refusal to issue or for a revocation of a license already issued, if the licensee himself, his partners or brother officers, have been guilty of a violation of Section 2 of the act making "unfair conduct" unlawful. "Unfair conduct," Section 2, is defined in connection with any transaction in interstate commerce as covering (1) fraudulent charging; (2) rejection without reasonable cause of perishable agricultural commodities; (3) discarding, dumping or destroying without reasonable

cause; (4) making for a fraudulent purpose false or misleading statements as to market conditions "for any perishable agricultural commodity which is received in interstate commerce", and a failure to account promptly; (5) fraudulent representations as to place of production of perishable agricultural commodities received in interstate or foreign commerce; (6) tampering with markings on containers as to the grade of the commodity, etc.

As to regulating the business:

The State Act, paragraph 7, requires commission merchants to keep records of produce, including name and address of consignor, dates of receipt, kind and quantity of produce, condition of the shipment, when received, the amount of goods sold, date of the sale, name and address of the person to whom sold and his license number, if possible, the price received, and the items of expense. Memorandum of this record, with exception of purchasers' names, etc., is to be sent, together with payment, to the shipper within 48 hours. The commission merchant is to retain the record for six months open to the inspection of the Director of Agriculture. The burden is placed on the commission merchant of proving the correctness of his records.

The Federal Act provides, Section 9, for the keeping of accounts and records disclosing all transactions covered by the act.

As to violations of the two statutes, complaints, hearings and punishment:

The State Act, paragraph 4, provides for investigation by the Director of Agriculture upon a verified complaint of a person interested, or on his own motion, with reference to commission transactions, including accounting, dealings with the shippers, and statements with reference there-

to. It gives the right to the Director to examine books and records of the commission merchant.

The State Act, paragraph 4, further provides that the consignor shall have the right to demand within sixty days an honest accounting. If he does not receive it within ten days thereafter he may file a complaint with the Director with full particulars. The Director then attempts to get an explanation, and failing one within seven days requires a hearing. At that hearing he has the right to revoke the license.

The State Act, paragraph 6, further provides that the action of the Director is subject to the review by the courts on writ of certiorari.

The Federal Act, Section 5, imposes a direct liability on the commission merchant to any person injured for any violation of the following paragraphs of Section 2: subparagraph 1, concerning fraudulent charging, and subparagraph 2, concerning unreasonable rejection of perishable commodities, and subparagraph 3, unreasonable discarding, dumping or destroying. and subparagraph 4, false and misleading statements as to market conditions, quality and quantity or disposition of the produce, and a failure or refusal to account correctly and promptly.

The Federal Act, Section 6, further provides for complaints by persons injured and investigation by the Secretary. In addition to the person injured *any officer of any State can file a complaint.* The Secretary investigates complaints filed, giving the person complained against an opportunity to be heard, and then determines whether there has been a violation.

The Federal Act, Section 7, further provides that if the Secretary after hearing determines there has been a violation he orders reparation, or the payment of damages, and if

the commission merchant does not comply within the time limited, the complaint can be followed up in the District Court of the United States, where the findings and orders of the Secretary shall be prima facie evidence of the facts stated. If the complainant succeeds he is entitled to attorney's fees.

The Federal Act, Section 8, further provides for publication of the Secretary's findings and the suspension of the license. And Section 10 stipulates that the findings are final unless proceedings are taken in court. In conducting these hearings the Secretary by virtue of Section 13 is given the power to examine the accounts and records of the commission merchant, and to suspend the license in the event of a refusal to permit an examination, to issue subpoenas, to compel the production of records and the attendance of witnesses and to order the taking of depositions. He is also given the power by Section 14 to employ inspectors to inspect and certify, even if there is no complaint, the quality and condition of any perishable commodity when offered for interstate shipment, all under such rules and regulations as he may prescribe.

As to penalties:

The State Act provides as a penalty for failure to comply with the terms of the act, paragraph 8, a fine of not less than $25, nor more than $500.

The Federal Act provides, Section 12, for the report of all violations to the Attorney General and prosecution by him.

The Federal Act, Section 11, makes applicable laws with reference to injunctions.

The Federal Act concludes, Section 15, that

"The Act shall not obscure or violate any other statute, whether State or Federal, dealing with the same

subjects as this Act, but it is intended that all such statutes shall remain in full force, except in so far as they are inconsistent therewith, or repugnant thereto."

In the stipulation of facts under which the consolidated cases was tried, it was agreed that the facts so stipulated, in so far as they related to the Cross Company, the construction of the statute by state authorities, and the exaction of the licenses and bonds under the statute in that company's case, applied equally as well to all other persons, firms or corporations in the City of Chicago who solicited, received and handled farm produce for sale on commission. (See par. 6 of Stip. R. 14.) In other words, the cases were tried to test the question whether the act in question was constitutional.

THE ERRORS RELIED ON FOR REVERSAL.

The error here relied on for reversal is that the Municipal Court of Chicago, and the Supreme Court of Illinois on appeal, erred in holding that:

The Illinois statute as construed to cover shipments in interstate commerce was not violative of the commerce clause of the federal constitution. (Art. I, Section 8, Clause 3);

That the bonds exacted under the statute so construed were valid so far as such interstate shipments were concerned, and covered such shipments;

And that the plaintiff was entitled to judgments on said bonds for the sums unaccounted for in connection with such interstate shipments.

SUMMARY OF ARGUMENT.

The Illinois statute is violative of the commerce clause of the federal statute in that it imposes a direct and substantial burden on interstate commerce.

The statute is not a mere tax on the property involved after it has become a part of the general mass of property within the state. It does not merely impose on men engaged in the business of commission merchants a tax measured by that business as a whole. But it undertakes to directly license and regulate the business itself, and to prohibit any one engaging in the business without such a license.

Without question both the shipment and sale of goods brought into Illinois from outside constitute interstate commerce.

The business of a commission merchant in handling such sales, particularly of "perishable agricultural commodities," is an integral part of the interstate commerce transaction:

First. Because in and of itself the functions it performs in connection with the sales are not indirect but are direct and constitute essential elements and factors in the completion of the interstate transaction;

Second. Because Congress has recognized the essentially important and vital part the business plays in the sale of such interstate shipments of perishable farm produce, and has by appropriate legislation provided for licensing and regulating that business, and prohibited those without a license from engaging in it.

These considerations render entirely inapt certain cases of this court, relied upon by the Supreme Court of Illinois in its opinion, and holding that the business of certain

commission merchants only remotely and indirectly affects interstate commerce transactions, and that hence the statute controlling that business is only a remote and indirect burden on commerce, and not invalid.

For the sole and only purpose of the owner in shipping his produce into Illinois is to effect a sale in the general produce market which exists for perishable farm produce, and protecting the goods meanwhile. And that purpose is solely carried out by commission merchants. They are the sole actors in that part of the transaction. If they fail to function the entire transaction is ineffectual.

And the finding of Congress that the business of the commission merchant dealing in "perishable agricultural commodities" not indirectly but directly affects interstate commerce, and the federal legislation controlling and licensing that commerce, conclusively demonstrate that the state act not incidentally but directly burdens the interstate commerce transaction.

Moreover, the federal legislation pre-empts the field with reference to this particular business.

The provisions of the federal act are entirely inconsistent with and repugnant to the provisions of the state statute. The absence of any provision in the federal act requiring as to interstate shipments a bond such as is required by the state act, is in itself a contradiction. Moreover, that absence represents not merely inaction but an affirmative conclusion by Congress to discard the theory embodied in the bond and exclude any such provision.

The inconsistency is further aggravated by the power given in the federal act to the Secretary of Agriculture to make rules and regulations with reference to the business.

Hence the Illinois statute being unconstitutional and invalid in so far as interstate commerce shipments are con-

cerned, the bonds exacted under that statute are invalid in so far as those shipments are concerned, and cannot be held to cover them.

By the execution and delivery of the bonds neither the Cross Company nor the Hartford waived the right to raise the question whether or not the act and the bonds exacted under it were valid as so construed.

ARGUMENT.

I.

THE SHIPMENT OF FARM PRODUCE FROM OUTSIDE THE STATE OF ILLINOIS ON CONSIGNMENT TO THE CROSS COMPANY IN ILLINOIS, AS WELL AS THE SALES OF THOSE GOODS ON BEHALF OF THE OWNER, WERE ALL TRANSACTIONS CONSTITUTING INTERSTATE COMMERCE. AND THE PART PLAYED BY THE COMMISSION MERCHANT IN THAT TRANSACTION IS SO IMPORTANT AND VITAL IN AND OF ITSELF THAT THE ATTEMPT TO REGULATE IT BY THIS STATE STATUTE IMPOSES A DIRECT AND SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE, AND IS THEREFORE VOID.

The authorities of this court have definitely and finally settled the proposition that shipments from one state to another, as well as the sales following those shipments constitute interstate commerce.

It is also an established doctrine that a state statute under whatever guise, whether it be taxing, licensing or regulating, which imposes a direct and real burden on such interstate commerce is void.

In making that statement we readily concede the importance of the qualification that the burden must be a direct and real burden as *contra* distinguished to an indirect or negligible one.

Mr. Justice Wilson in rendering the opinion of the Supreme Court of Illinois relies especially upon the case of *Hopkins* v. *United States*, 171 U. S. 578.

In the case cited the Government was attempting to dissolve the Kansas City Live Stock Exchange, a voluntary association, on the charge that it was a combination in violation of the federal anti-trust law. The association was

engaged at the Kansas City Stockyards in the business of buying and selling live stock which had been sent in on consignment from other states. This court held that, conceding the fact that the sales themselves constituted interstate commerce, it did not follow that all persons performing services in that connection were engaged in interstate commerce; nor did it follow that the agreements made by such individuals amongst themselves as to compensation, etc. were made in restraint of interstate trade.

This it was further pointed out necessarily followed from the principle laid down in many prior cases drawing a distinction between regulations directly affecting and embarrassing interstate commerce, those which affected it only indirectly or slightly or constituted nothing more than a local facility provided for the transaction of such commerce.

The court concluded that the commission merchants constituting the Kansas City Live Stock Exchange were not engaged in a function which directly affected interstate commerce, and that therefore they were not subject to the anti-trust law.

We submit that this case has not the compelling effect given it by the opinion of the Supreme Court of Illinois, since it is simply as pointed out by this court in many later cases, a decision with reference to the particular facts there involved. And it cannot control, therefore, with reference to functions similar, it may be true, but sufficiently different in their importance to make up the difference between a direct and an indirect effect on interstate commerce.

Furthermore, the decision cannot be considered in point at all, in view of the all important fact that Congress itself has determined that the commissionman is an essential element in interstate commerce shipments and sales of perishable farm products.

In connection with the Hopkins case we desire to point out particularly the three following cases:

Stafford v. *Wallace,* 258 U. S. 495 (May, 1922).

This case also involved the members of a live stock exchange, including the commission merchants buying and selling live stock in the stockyards throughout the country. These parties filed equity proceedings to enjoin the enforcement of the Federal Packers and Stockyards Act, claiming that under the Hopkins case they as commission merchants were not engaged in interstate commerce. This court points out the evils sought by Congress to be corrected, and that in view of the conspiracy charged in connection with the entire business the commission merchants were in fact a part of the interstate commerce engaged in that entire business.

And in distinguishing the Hopkins case, this court says on page 525:

> "Again, if the result of the combination of commission men in the Hopkins case had been to impose exorbitant charges on the passage of live stock through the stockyards from one State to another, the case would have been different, as the court suggests. The effect on interstate commerce in such a case would have been direct."

In the case of *Bedford Company* v. *Stone Cutters Association,* 274 U. S. 37, a labor union case, this court with reference to the Hopkins and Anderson cases, 171 U. S. 578 and 604, says, at page 49:

> "But of those cases we need say no more than that they involved agreements which neither in purpose nor in necessary result related to or had any direct effect upon interstate commerce."

The case of *Stockard* v. *Morgan,* 185 U. S. 27, makes no reference to the Hopkins case, but the court spoke through Mr. Justice Peckham who also wrote the opinion in the Hopkins case. The Morgan case was a suit to enjoin the

collection of a tax on a merchandise broker under statute of Tennessee. The complainants were residents of Tennessee, taking orders for goods in Tennessee, which orders were to be filled outside of the state. Complainants were paid a commission. They contended that they were doing an interstate commerce business and that the law as applied to them was unconstitutional. This court so holding, says (p. 35):

> "In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms or corporations, all of whom were nonresidents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins* case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question."

In the recent case of *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, the question presented to this court was whether or not a statute of the State of New York was violative of the commerce clause in that it attempted to license milk dealers and prohibit any one without a license from selling milk in the state, and forbade such a license to any one refusing to sign an agreement to conform to the New York statute and regulations in the sale of milk imported from other states. This an applicant refused to do, because he was able to buy milk in Vermont at prices lower than the minimum payable to producers in New York. He sought to enjoin the prosecution of the enforcement of the law. An injunction was granted in so far as the statute attempted to license the sales of milk brought in and sold in the original containers. It was denied as far as the licensing of sales of milk that was removed from the original containers to bottles and then sold.

This court holds that the injunction was properly granted as to the original package sales, and should have been granted as to the others, as it was all a part and parcel of interstate commerce.

With reference to the question whether the burden thus placed on the transaction was direct or indirect, this court says, at page 522:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the State taking form in customs barriers and other economic retaliation.' "

Texas Transportation Co. v. *New Orleans,* 264 U. S. 150. Here there was involved a license tax imposed by the City of New Orleans upon the business of a steamship agent. The agent resisted the tax on the ground that it was a violation of the Commerce Clause of the Constitution. He was employed by four steamship lines on a commission based upon the gross freight charges collected on shipments successfully solicited by him. All of the four companies were exclusively engaged in interstate commerce. This court said, *page 152:*

> "* * * We find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard* v. *Morgan,* 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. * * *"

A similar case to this is the one following.

Di Santo v. *Pennsylvania*, 273 U. S. 34.

In this case it appears that the Pennsylvania law required that a license be taken out by any one selling steamship tickets for transportation to foreign countries. Di Santo was indicted because he had not obeyed the law. He contended that it contravened the commerce clause of the federal constitution. The court sustained his contention, saying, at page 36:

> "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. * * * Such legislation cannot be sustained as an exertion of the police power of the state to prevent possible fraud. *Real Silk Mills* v. *Portland*, 268 U. S. 325, 336. * * * The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce."

Real Silk Hosiery Mills v. *Portland*, 268 U. S. 325.

Real Silk Hosiery Co. sold their product through drummers soliciting and accepting orders. The solicitor would take a dollar deposit, forward the company the order, and the company would send the order parcel post c. o. d. The deposited dollar was retained by the solicitor as his commission. The company undertook to pay back the dollar if the purchaser was dissatisfied.

The corporation was an Illinois corporation, with factory at Indianapolis. The City of Portland, Oregon, passed an ordinance requiring every person soliciting orders from place to place to pay a license fee and to furnish a bond conditioned to make final delivery of the ordered goods. A

bill was filed to restrain the enforcement of the act as being repugnant to the commerce clause. This court said (p. 335):

> "'The negotiations of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' Manifestly no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189."

In the Texas Transportation Company and Real Silk Hosiery cases just cited, the fact is stressed that the negotiations for the sales took place prior to the introduction of the goods within the state. But it really makes no difference when the negotiations took place as is pointed out in the following cases.

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282.

A Tennessee corporation bought wheat in Kentucky, the wheat to be delivered and paid for there f. o. b. Purchaser was to ship the wheat to Tennessee. Suit was brought in Kentucky to recover the purchase price. The defense was that the plaintiff had not complied with the Kentucky statute, prescribing conditions upon which corporation of other states might do business in the state.

The court said (p. 290):

> "Where the goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages."

(On page 291):

> "In no case has the court made any distinction between buying and selling or between buying for transportation to another State and tranporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

See also to the same effect:

Furst v. *Brewster*, 282 U. S. 493.

Note also in this connection the decision of this court in the case of *Baldwin* v. *Seelig*, above cited, 294 U. S. 511, where the same situation existed with reference to negotiations for the sale as exists in the case at bar.

Crutcher v. *Kentucky*, 141 U. S. 47, involved an indictment against Crutcher for doing business as an agent for the United States Express Company, without a license under a state statute. Crutcher contended that the act in question was repugnant to the power given to Congress to regulate commerce.

This court in holding the statute void said (p. 58):

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (Citing cases.)

Federal Trade Commission v. *Pacific Paper Assn.*, 273 U. S. 52.

This was a Federal Trade Commission case under the anti-trust laws. An attack was made on a certain trade association of paper manufacturers as a combination in restraint of trade. The question was whether the activities constituted interstate commerce. It was shown that the sale by the wholesaler to the retailer in the same state in-

cluded as a part of the contract a delivery of the paper sold from a mill in another state to the retailer.

In holding that this constituted interstate commerce, this court said (page 64) that interstate commerce

> "is not confined to transportation but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55."

Corson v. *Maryland*, 120 U. S. 502:

> "Maryland statute provides that "no person * * * other than grower, maker or manufacturer shall barter or sell * * * goods * * * within this State without first obtaining a license."

A New Yorker was indicted because he had come into the state and sold goods as a commission merchant without a license. The Supreme Court holds that the same principle applied as was applied in an earlier decision of the same term, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. In that case a Tennessee statute required that all drummers not having an actual licensed house of business in Shelby to take out a license. An Ohio resident who was selling in Shelby without a license was indicted. It was held that as far as he was concerned the act was repugnant to the federal constitution.

Lemke v. *Farmers Grain Co.*, 258 U. S. 50.

Suit by Farmers co-operative association to enjoin the enforcing of the North Dakota Grain Grading & Inspection Act.

It was shown that there was no market for the grain in North Dakota, and that all grain was taken to the grain elevators and from there shipped to other states. The associa-

tion was co-operative and the grain was simply held in the elevators pending the sale. The association would watch the market prices of grain and decide to sell and ship it to Minneapolis, Duluth, etc. consigned to commission merchants.

The court said, page 54:

> "That such course of dealing constitutes interstate commerce there can be no question."

The court then takes up the question whether the act is a burden on interstate commerce and holds that it is in view of the many regulations as to licensing, grading, etc.

Brown v. *Maryland,* 12 Wheaton, 419, 25 U. S. 554.

A Maryland act imposed a tax upon all importers of foreign goods. A man engaged in that business was indicted. His defense was that the act was unconstitutional for the reason, amongst others, that it violated the commerce clause. And the court, speaking through Chief Justice Marshall, in sustaining that position says at page 565:

> "Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.'

Mr. Justice Wilson in his opinion in the Supreme Court of Illinois cites the case of *Minnesota* v. *Blasius,* 290 U. S. 1. But in that case the question was of a tax on the property which had come to rest in the state. It does not gainsay the principle above cited that the sales of goods transported into the state as well as the transportation constitutes interstate commerce.

We submit that the tax on the property which has become a part of the general mass of the property within the state, as was found to be the fact in the Blasius case, is basicly different from a license on the business of bringing that property within the state and selling it. That distinction lies in the principle pointed out by this court as follows, on page 9 of the opinion:

> "Thus, the State cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax."

Also in the opinion of Mr. Justice Wilson there is cited and relied on the N. R. A. decision, *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495. But in this citation the essential fact is overlooked that the action regulated by the federal statute was the handling of the goods which were shipped in from other states *after* those goods had been sold by the *commission men* in the markets to residents in New York State for slaughter and resale. The regulations related to the hours and wages of those employed in the slaughter houses in connection with this part of the transaction. And this court particularly holds, on page 542, that:

> "When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended."

This very fact marks the distinction between the Schechter case and the case of *Local 167, International Brother-*

hood of Teamsters v. *United States*, 291 U. S. 293. The case at bar, we submit, is directly within this last mentioned case.

Local 167, International Brotherhood of Teamsters, etc. v. *United States*, 291 U. S. 293.

This was a decree from an injunction against a conspiracy claimed to have been committed by the above referred to union, together with the New York Live Poultry Chamber of Commerce and the conspiracy concerned prices, etc. The Chamber of Commerce was an association of market men. The question before the court was whether or not the parties involved were engaged in interstate commerce in connection with their dealings with live poultry. This court, describing the decisions, says at page 295:

> "Live poultry for sale and consumption in the New York metropolitan area continuously moves in great volume from points in distant States to commission men, called receivers, at railroad terminals in Manhattan and Jersey City. The receivers sell to market men. The larger part of the poultry is delivered directly from the cars; the remainder from stands maintained by the receivers."

With reference to whether or not interstate commerce was involved in this business the court says, at page 297:

> "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

We submit, therefore, that these cases decided mostly since the decision in the case of *Hopkins* v. *United States*, 171 U. S. 578, clearly show, as to sales made in interstate commerce, the demarcation between the functions described in the Hopkins case and those, which because of their importance, are not merely collateral matters, but are an integral part of the interstate commerce transaction.

All of those cases must be considered in connection with the business which the state undertook to regulate and license, namely, the business of handling perishable farm produce. The very nature of that business requires prompt and immediate handling. And any regulations must of necessity have the effect of hampering the expedition demanded.

The produce sent in from outside the state on consignment to the commission merchants regularly in business within the state, is sent by the producer for one purpose only, to sell it. And it is the immediate job of the commission merchant to effect that sale. If he fails to function in making the sale the entire transaction becomes an *idle gesture. If he fails in his duties in preserving a* perishable commodity, the owner has not only lost his sale but has lost his goods.

The importance of his functions, therefore, cannot be measured. Certainly to attempt to separate them from the shipment and the sale itself is a practical impossibility. The function starts with soliciting the shipment, with the action of the shipper in selecting the particular commission merchant, and ends when the sale has been consummated. If the commission merchant's part were separated in this transaction, practically speaking, nothing would be left.

II.

THE ACTION OF CONGRESS IN REGULATING AND LICENSING THE BUSINESS OF COMMISSION MERCHANTS ENGAGED IN INTERSTATE SHIPMENTS IS A CONCLUSIVE SHOWING THAT THE FUNCTIONS PERFORMED BY A COMMISSION MERCHANT IS AN ESSENTIAL PART OF THE INTERSTATE COMMERCE TRANSACTION. HENCE THE STATE ACT UNDERTAKING TO LICENSE THOSE FUNCTIONS IS A DIRECT BURDEN ON THE INTERSTATE COMMERCE TRANSACTION, AND IS VOID.

We think it well to note again that the Federal statute referred to in the opinion of the Supreme Court of Illinois is not the one upon which the appellant relies here and has relied from the first; all as more fully explained at page 7 above.

At page 7 above, the State Act and the Federal Act upon which we rely are summarized. The complete copies of the Acts are attached to this brief as Appendix "A" and "B" respectively.

Even if it were admitted that the business of a commission merchant is not in and of itself a direct substantial part of the interstate commerce involved in the shipment and sale of foreign goods, it is clear that that contention can no longer be made after Congress has found that the business of a commission merchant is a substantial part of the interstate commerce involved, and undertakes to regulate it.

When such a situation exists it is a demonstration that the business and activities sought to be licensed and regulated by the State is interstate business. And it demonstrates also that the state statute affects the business not incidentally but directly and imposes a substantial burden upon it. It is this consideration which has differen-

tiated between the case of *Hopkins* v. *U. S.*, 171 U. S. 578, and many subsequent cases.

Stafford v. *Wallace*, 258 U. S. 495.

This case involves the constitutionality of Packers and Stockyards Act of 1921. There were several actions, some of which involved commission merchants conducting sales of cattle shipped into the stockyards from other states. It was contended that the transactions were not interstate commerce, and therefore not within the federal power. The opinion was by Judge Taft in 1921. He said, page 515:

> "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

The two following cases also demonstrate very clearly the principle that where Congress has found an activity that is

connected with interstate commerce to need regulation, that very fact shows it must be regarded as a substantial part of interstate commerce; and any attempt to regulate it by state statute is unconstitutional.

Ware and Leland v. *Mobile County*, 209 U. S. 405 (1908).

Here an Alabama statute imposed a license tax on persons engaged in buying and selling futures on commission. The defendant had an office in Alabama, also in New York, New Orleans and Chicago. He would undertake to buy cotton futures on the Cotton Exchange in New York, New Orleans, etc., with nothing said as to actual delivery of the cotton. No actual delivery was ever made, although the rules of the New York, New Orleans and Chicago Exchanges required a delivery.

The court, following the *Paul* v. *Virginia Insurance* case (8 Wall. 168) said there was no interstate commerce involved and sustained the state statute.

But in the later case of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, where there was involved a federal act which had been drafted for the very purpose of licensing and controlling interstate sales and purchases of grain, and in that connection of eliminating certain evil features in connection with grain futures, the court held that the business of dealing in grain futures was interstate commerce subject to a federal act.

In that case it appeared that the Board of Trade of Chicago had filed a bill for injunction to enjoin the enforcement of the provisions of the National Grain Futures Act.

This court speaking through Mr. Justice Taft held that the act was framed to prevent trade in grain futures because Congress had found that such trade constituted a recurring burden and obstruction to commerce. The court pointed out that the Board of Trade is the greatest grain

market in the world and that the *Swift* case (196 U. S. 375) was a milestone and recognized the great changes and developments of business in the country, and concluded that the finding of Congress that the business as engaged in by the Board of Trade was interstate commerce was not unreasonable.

Shafer v. *Farmers Grain Co.*, 268 U. S. 189, involved a statute of the State of North Dakota requiring any person wishing to engage in the business of buying, weighing and grading wheat to apply for and secure a license from the state authorities. There was a bill to enjoin enforcement of the act. This court in holding that the act was unconstitutional as constituting a substantial burden on interstate commerce, comments particularly on the requirements of the act as to the license and as to its cancellation should the licensee not honestly and correctly handle his business or violate any of the provisions of the United States Grain Standards Act. The act also required that grain elevators in paying cash in advance should file sufficient bond to secure payment for wheat bought on credit. The court noted the two rules with reference to such statutes, first, that if it interferes only incidentally and remotely with interstate commerce it is not prohibited and, second, that if its necessary operation directly interferes with and is a burden to such commerce it is prohibited. It then said, at *page 199:*

> "In our opinion the North Dakota Act falls certainly within the second of the two rules just stated. By it that state attempts to exercise a large measure of control over all wheat buying within her limits. About 90 per cent. of the buying is in interstate commerce.
>
> * * *
>
> "Only by disregarding the nature of this business and neglecting important features of the Act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. To conform to recognized commercial practices

such buying must be by grade, and it is so conducted. The Act prevents buying by grade, unless the buyer secures from the State a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The Act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for. A failure to comply with this or any other requirement of the act is made cause for revoking the grading license. It is practically essential that the buyers have and operate elevators as facilities for handling and loading the wheat. The act requires every such buyer to give to the state, if he buys on credit, a bond securing payment for all wheat so purchased; to keep a record of all wheat bought, showing the grade given and price paid at his elevator and the grade fixed and price received at the terminal market; and to furnish such data to the State Supervisor when requested. The Act also intends and declares that the State Supervisor 'shall in a general way investigate and supervise the marketing' of the grain with a view of 'preventing' various things deemed unjust or fraudulent, including 'unreasonable margins of profit' and 'confiscation of valuable dockage;' and, to the end that this and other provisions may be made effective, the Act invests him with authority to make and enforce such orders, rules and regulations as may be necessary to carry out all of its provisions.

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause."

We quote this fully from the decision to show the important part that the character of the supervision bears to the court's opinion. With reference to the contention of the State authorities that the evils sought to be corrected were very real, the court answers, on page 202, that that would be a matter for Congress and not the State.

From the above quotation it is to be noted that there was also in force at the time the United States Grain Standards Act. It was contended that the State act was simply an attempt to assist in carrying out the purposes of that act. In connection with this contention the court says, at *page 202:*

> "We think the Act discloses an attempt to do much more. To require that dockage be separated by the buyer and be returned to the producer unless it be distinctly valued and paid for is not inspection. Nor does the federal Act contain or give support to such a requirement. To exclude one from buying by grade unless he secures a grading license for himself or his agent is apart from what usually is comprehended in inspection. Nothing like this is found in the federal Act. On the contrary, it declares that persons licensed to grade under it shall not be interested in any grain elevator or in buying or selling grain, or be in the employ of any owner or operator of a grain elevator. Equally unrelated to inspection are the provisions exacting a bond to pay for all wheat bought on credit; requiring that a record be kept of the price paid in buying at the local elevator and the price received in selling at the terminal market; and authorizing the State Supervisor to investigate and supervise the marketing with a view to preventing unreasonable margins of profit. None of these finds any example in the federal Act; and their presence in the state Act makes it a very different measure from what it would be without them. Aside from the adoption of the grades established and promulgated under the federal Act, we find little in the state Act to support and much to refute the assertion that it is merely an attempt to carry out the purposes of the federal Act."

III.

CONGRESS HAVING UNDERTAKEN TO LICENSE AND REGULATE THE BUSINESS OF COMMISSION MERCHANTS HANDLING PERISHABLE AGRICULTURAL COMMODITIES IN INTERSTATE COMMERCE, ANY STATE STATUTE ATTEMPTING TO DO THE SAME IS UNCONSTITUTIONAL AND VOID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

Oregon-Washington Co. v. *Washington*, 270 U. S. 87.

In this case it appears that a very bad insect pest became prevalent through certain states of the west, chiefly confining itself to alfalfa. The state of Washington undertook to place a quarantine upon introduction of alfalfa across its border lines from other states. On the question of constitutionality the Supreme Court held that the act was within the power of the legislature of Wash' gton unless the national congress had elected to cover the same field. The court then studied an Act of Congress providing for the handling of just such pests and quarantining the sections where the pest was prevalent; and in holding that the federal act was exclusive and the state act therefore void, says, at page 99:

> "It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the States under the direction and supervision of the Secretary of Agriculture."

It was said by Justice Holmes in the case of

Pennsylvania Railroad v. *Public Service Commission*, 250 U. S. 566, at page 569:

> "But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

In that case the State of Pennsylvania had passed a law providing that the rear car on any train should have a platform thirty inches wide. The railroad defended on the ground that it could not comply, as the Post Office Department had specified just the kind of mail cars which should be constructed and in the specifications stipulated there should be no platforms. The court held that the state statute was unconstitutional, using the language above referred to.

The same principle was laid down in

Sanitary District v. *United States*, 266 U. S. 405, 426.

> "In matters where the States may act, the action of Congress overrides what they have done. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. *Second Employers' Liability cases*, 223 U. S. 1, 53."

Where regulations of the State statute regulating commerce cover the same field as provisions in a Federal statute, the State statute must of necessity fall. And it is submitted that a reading of the provisions of the Federal and State statutes above summarized respectively demonstrate that they do cover the same field.

Southern Railway Co. v. *Railroad Commission of Indiana*, 236 U. S. 439. An Indiana act required railway companies to place handholds on the sides or ends of every railroad car. A Federal act required cars to be equipped

with handholds. The defendant railroad was accused of not having complied with the State law. It was admitted that the car was engaged in interstate commerce. The defendant contended that the State statute was void. The State contended that the statute was not void as it had been settled by this court that the same action might constitute a criminal offense both as to Federal and State sovereignties. In answer to this contention this court held that an analysis of the principle showed that it related only to cases where the act sought to be punished is the one over which both sovereignties had simultaneous jurisdiction, and did not apply where a sovereign had exclusive jurisdiction when exercised; (445) and that such was the case with reference to interstate commerce where Congress had (page 446)

> "legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employes. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto,* supersedes existing state legislation on the same subject. Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. *Savage* v. *Jones,* 225 U. S. 501, 533. *Atlantic Line* v. *Georgia,* 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties."

The court concludes, at *page 448:*

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control. The Safety Appliance Act having superseded the Indiana statute the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

Napier v. *Atlantic Coast Line*, 272 U. S. 605. This case involved a question of whether certain State statutes, calling for the installation of certain safety and comfort appliances on locomotives used in interstate commerce, were violative of the Commerce Clause of the Constitution, in view of the Federal Locomotive Boiler Inspection Act which gave to the Interstate Commerce Commission the power, not only to inspect locomotives, but to specify the sort of equipment to be used upon them. The court with reference to this question states that the devices prescribed by the states were primarily to promote health and comfort and then said, at *page 610:*

> "* * * It may be assumed, also, that there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only. * * *"

The court goes on to hold that the power delegated to the Commission was a general one and extended to every phase of the locomotive and concludes, at *page 613:*

> "* * * We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

We submit that the federal statute involved in the case at bar, and the regulations of the Secretary of the Agriculture promulgated within the general provisions of the statute, constitute a broad general power of license and control to be exerted by the federal authorities over the business in question when covering interstate commerce shipments. This is exactly the same field that is covered by the State act.

The State act prohibits anyone from engaging in the specified business without a license. If that act is to be construed to cover interstate business, then anyone even though he already has a license from the Secretary of Agriculture under the Federal statute would not be permitted to enter into the commission business with reference to interstate shipments. This in itself is such a serious conflict as to bring the statute within the decisions cited. The State statute requires a license for each location in which the commission merchant conducts his business. (Sec. 2.) The Federal statutes requires but one license wherever the business is done. (Sec. 3.)

If we add the other regulatory powers, the situation if possible is aggravated.

Consider for instance the complaints that can be made by nonresident shippers who feel they have been injured. Is it possible that they must present their complaints to both State and Federal authorities? Consider also the fact that both the State and Federal statutes give specific remedies in the event of a failure of the commission man to account. Must the shipper go to both? Or if he goes to one the other may bring the matter up of its own accord. Whose judgment is to be regarded as final? Consider also the anomaly of a State authority under the State act finding that a given action on behalf of the commission merchant was fraudulent, requiring a revocation

of his license to do interstate commerce business, and a consideration of the same question by the Federal authorities and an equally final conclusion that the action was not fraud, the license should not be revoked and that the merchant could continue in business.

Moreover, the provision of the federal statute (Sec. 6 (a)) giving to a State authority having jurisdiction over commission merchants in such State, the right to file a complaint before the Federal authorities, seems clearly to indicate the intention of Congress to give the exclusive jurisdiction with reference to interstate shipments to the Federal authorities.

We submit that these considerations show that the State statute as construed by the Supreme Court of Illinois to apply to interstate shipments and the Federal statutes are mutually exclusive.

Mr. Justice Wilson in the Supreme Court of Illinois decision cites the following cases which we respectfully submit are obviously distinguishable from the case at bar:

In the case of *Mintz* v. *Baldwin*, 289 U. S. 346, the question was as to the conflict between a New York statute forbidding the importation of cattle suffering from Bang's disease and Federal statutes undertaking to regulate the handling of cattle in interstate commerce. This court, holding that there was no conflict, points out that the New York statute expressly prohibited the importation of cattle suffering from the disease in question, whereas in the two Federal statutes the only provisions included were first those in the Federal Cattle Contagious Disease Act applying merely to shipments from quarantine districts; and, second, another act which simply gave the Secretary of Agriculture the power to prevent the spread of disease by appropriate regulations. It was shown that no such regulations had been issued so that importation of the cattle in question was not covered at all.

Another case cited is that of *Hall* v. *Geiger-Jones,* 242 U. S. 539, where there was no Federal Act involved, but the question was whether the provisions of the Ohio Blue Sky Law with reference to the sale of securities in Ohio contravened the Commerce Clause of the Constitution so far as it attempted to license and control dealings between Ohio brokers and others outside the State. The court comments upon the fact of the intangibility of the securities and passing by the question of whether they constituted interstate commerce holds that although there may have been some burden by the act it was indirect and the act was "valid in the absence of the assertion of the national power" (557).

Another case cited is that of *Savage* v. *Jones,* 225 U. S. 501, where there was in question an Indiana statute with reference to branding of certain food stuffs for domestic animals and requiring that before certain products of that nature be sold the manufacturer should file with the State Chemist a certificate of registration giving detailed information concerning the article. The question was whether this statute was in conflict with the Federal Food and Drugs Act. This court held it was not as that act simply was aimed at preventing adulteration and misbranding and with the exception of a few instances like morphine, opium, etc., contained no prohibition against transportation. Under these circumstances the court held that in the absence of more specific prohibition by Congress the State of Indiana still had the right to prohibit the introduction within its borders of substances that it determined were deleterious to the health of animals.

The case of *Sligh* v. *Kirkwood,* 237 U. S. 52, is also cited. In that case there was a Florida statute involved which prohibited the sale within its borders of citrous fruits which were immature or unfit for consumption. The court

held this statute valid, even as to shipments from outside the State, particularly in view of the fact pointed out on page 62 of the opinion that "no act of Congress has been called to our attention undertaking to regulate shipments of this character which would be contravened by the act in question," and that the Federal Food and Drugs Act did not cover the situation, as it prohibited only filthy, decomposed or putrid fruits and made no reference to immature fruits.

These cases, we submit, are clearly different from the case at bar.

Section 15 of the Federal act purporting to arrange for cooperation between the Federal authorities and the State authorities does not help the situation. Its provision that it shall not abrogate or nullify any State statute dealing with the same subject as this act cannot be held to apply to interstate commerce. Its purpose obviously is to eliminate any possibility of the contention that, having regulated the commission business as to shipments in interstate commerce, such regulation must of necessity affect the intrastate business and that, therefore, not only statutes relating to interstate business but those relating to intrastate business would be void. In other words, the section purports to obviate the contention applied with reference to interstate railroad rates and other like instances. This is particularly true in view of the very next sentence in the statute:

> "But it is intended that all such statutes shall remain in full force and effect *except in so far only as they are inconsistent herewith or repugnant hereto.*"

We submit for the reasons above pointed out and from a reading of the provisions of the two statutes that they are obviously inconsistent and repugnant as far as shipments in interstate commerce are concerned.

Certainly the provisions with reference to licensing are mutually exclusive. Complications of a double license being required with reference to the commission business would be endless and confusing. Complications and conflicts in double hearings and double penalties would be endless.

The State Act provides for a bond, the Federal Act does not. But the history of the Federal Act as disclosed by the proceedings in Congress shows that the provision was considered and discarded. The Act was first presented to Congress by Senator Borah in the 70th Congress, first session, as Senate Bill 1294. It was referred to the Committee on Agriculture. At that time it contained a section requiring a bond conditioned on full accounting. The Committee amended the bill materially, and in its report (Senate Report 825) included a copy of a letter from the Secretary of Agriculture as follows:

> "The bill as now drawn requires every person subject thereto to give a bond. Although the Department appreciates that good reasons for this requirement may be advanced, it is not believed that the losses that would be avoided through the giving of bonds would justify the expense that would be incurred in requiring their execution."

And the Committee adds that the letter points out the power of revoking licenses is considered sufficient. The provision concerning the bond was eliminated.

The bill in that form passed the Senate, but was not considered by the House. It was reintroduced by Senator Borah in the 71st Congress, and there passed both Houses. Speaking of this bill Senator Borah notes:

> "The original bill was much more drastic and placed the commission merchants, dealers and brokers under bond." (Congressional Record, 71st Congress, Part 2, page 2164.)

It is clear, therefore, that the absence of the bond pro-

vision in the Federal statute resulted from the express purpose of Congress, and that there is just as much conflict between it and the bond provision of the State statute as there is between the other sections of the two statutes.

IV.

THE PROVISIONS OF THE COMMISSION MERCHANTS ACT UNDER WHICH THIS BOND WAS EXACTED MUST BE REGARDED AS THOUGH THEY WERE INCORPORATED IN THE BOND.

THAT ACT BEING UNCONSTITUTIONAL AND VOID, THE BOND IS VOID AND UNENFORCEABLE AS AGAINST THE SURETY AS WELL AS THE PRINCIPAL.

It will be noted that the bonds sued on in this case refer directly to the statute in question (R., 4).

Moreover, it is a fundamental principle of law that where a bond is executed and delivered in accordance with the requirements of a statute, the bond must be construed as though the statutory provisions were incorporated in it.

Estate of Ramsey v. *People*, 197 Ill. 572.

And when the statute falls as void the bond falls with it.

This very question was passed upon by the Illinois Supreme Court in two cases, where it was held that if the statute requiring the license and bond was void as being unconstitutional, the bond was void not only as to the principal, but also as to the surety.

People v. *Federal Surety Co.*, 336 Ill. 472.

In this case the court sustained the right of a surety company to invoke the defense that the so-called Blue Sky Law of Illinois was unconstitutional in so far as it required a security dealer to furnish a bond, conditioned on his faithful compliance with the statute, and that the statute

being void the bond also was void. From the opinion it appears that under the statute referred to, all dealers in securities were required to procure a license before transacting such business, and as a part of the application for such license, to secure and deliver to the Secretary of State a bond containing the terms and conditions and in the form to be approved by him.

Gettelman & Company was a firm of investment bankers. It applied for a license and delivered a bond in accordance with the terms of the Act. Thereafter one of its customers claimed that Gettelman & Company had failed to comply with the statute and regulations, and brought suit in the name of the People of the State of Illinois against the surety.

The surety set up the defense that the statute was unconstitutional, and the Supreme Court of Illinois so held. But the State authorities contended that even if it were true that the statute was unconstitutional the surety was in no position to raise that defense. But the court in holding against that contention says, page 480:

> "Estoppel applies only against a person who has by his words or conduct induced a belief in the existence of a state of facts upon which another has been induced to act. *Gettelman & Co. in the absence of the statute had the right to engage in the business of dealer and broker in securities without giving any bond.*" (Italics ours.)

The court then reiterates the statement that the provision with reference to procuring the bond was unconstitutional, and then continues, on the same page:

> "Therefore Gettelman & Co. was not obliged as a condition of engaging in the business of dealer and broker in securities, to give a bond. The giving of the bond gave it no better right to engage in the business than it had without the bond. The bond was without consideration. The company received no benefit from it. Even if it was fraudulently given, the rule which

has been announced, that where the obligor has obtained and availed himself of the benefits to be derived from the execution of the bond he cannot defeat liability because of the unconstitutionality of the statute, does not apply. That rule requires that a party shall have availed himself, for his own benefit, of an unconstitutional law, but the facts are that the defendant did not and could not avail itself of the statute for its benefit. Without the law Gettelman & Co. had the right to engage in the business of dealer and broker in securities. It needed no license or permission to do so."

In *People* v. *Beekman & Co.*, 347 Ill. 92, the same question came up where the constitutionality of a subsequent Blue Sky Law was under discussion. That Act also provided that the security dealer had to procure a license from the State before entering business, and before procuring a license would have to put up a bond conditioned upon a faithful accounting by the security dealer. There was a breach of this bond, and in the suit brought upon it, the Supreme Court of Illinois, following the Federal Surety case, held the Act unconstitutional and bond void, and that the Surety Company had the right to raise that defense.

It was alleged that the security holder had breached the contract in making false representations contrary to the statute in connection with the sale of some stock, and that the security dealer had converted stock and failed to account for the money. The court again held that section 23 was unconstitutional and void. And the question again raised as to whether or not the Surety Company could interpose that defense was again thoroughly considered by the court, and the Federal Surety case above quoted was reaffirmed as follows, page 98:

> "Appellant contends that even if it be conceded that the classification is abritrary the surety cannot be heard to complain. This contention was decided to the contrary in *People* v. *Federal Surety Co., supra.*"

The principle laid down in these cases naturally flows

from the generic proposition with reference to the obligations of a surety that in the absence of special provisions to the contrary, those obligations are commensurate with the obligations of the principal, no greater, no less, as was said in 50 Corpus Juris, 74 (Principal and Surety):

> "In the absence of limitations or restrictions contained in the contract the liability of the surety is coextensive with that of the principal."

The same rule is stated in Childs on Suretyship, page 332, "The general rule is that the liability of the surety is commensurate with that of the principal."

> *Constable* v. *National Steamship Company,* 154 U. S. 51, 77.

This case was an action on a bond which had been exacted by the Federal authorities under a misconstruction of the statute with reference to the situation involved. This court in sustaining the defense of the surety that the bond was therefore void said, at page 78:

> "Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties, *inter sese* as to be of no avail to the consignee.
>
> It is a familiar doctrine in this court that a bond or other obligation extorted by a public officer, under color of his office, cannot be enforced, and the remarks of this court in the case of *United States* v. *Tingey,* 5 Pet. 115, 129, are pertinent in this connection."

In another case, *Moses* v. *United States,* 166 U. S. 571, it appears that a bond was exacted by the Government from an Army Lieutenant, conditioned on his faithful accounting for moneys held by him. There was no statute involved, and therefore the bond was not void. There was no question of any illegal compulsion in connection with the bond. The court in so holding discusses the general proposition, and particularly refers to the case of *United*

States v. *Tingey*, 5 Pet. 115, quoted in the Constable case above cited, and then states (page 586):

> "The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute, it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery.
>
> We do not understand by the decision in Peters, above cited, that the meaning of the term 'voluntary bond' is that the bond must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted, in violation of any law or valid regulation of a department. Having the right to take a bond, the Government in a case like this has the right to demand it from the officer, and to say to him that if he do not give it he will not be continued as a 'property and disbursing officer of the Signal Service.' Such a demand when complied with does not amount to the illegal exaction and extortion of the bond. The case of a bond so procured differs radically from a case like that of *Tingey* (*supra*), inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for."

In the case before this court the bonds were extorted by the State officers *colore officii* under a statute which is void so far as the construction is concerned that they put upon it. And hence the bond is void to the extent of the same construction, namely, with reference to shipments from outside of the State.

Respectfully submitted,

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APPENDIX "A".

ILLINOIS STATUTE.

COMMISSION MERCHANTS LAW.

Smith Hurd, Chap. 5, Sec. 17-24
Cahill, Chap. 5, Sec. 24-32.

AN ACT *to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named.* (Approved June 28, 1919, as amended.)

Terms Defined.] § 1. *Be It enacted by the People of the State of Illinois, represented in the General Assembly:*

(a) That the term commission merchant shall include every person, firm, exchange, association and corporation licensed under this Act to receive, sell or offer for sale on commission, within this State, any kind of farm produce; except where such farm produce is sold for consumption and not for resale. This Act shall not apply to the sale of farm produce at public auction by a duly licensed and bonded auctioneer, acting as the agent of another to whom such farm produce shall have been consigned; nor shall this Act apply to seeds sold at retail; nor shall this Act apply to grains and seeds which are classified into grades by any governmental or State Department duly created by any law of the State of Illinois or of the United States.

(b) The term "Farm Produce" shall include all agricultural, horticultural, floricultural, vegetable and fruit products of the soil, and poultry, wool, feathers, fur, hides, eggs, dairy products, nuts and honey, but shall not include timber products, tea or coffee.

(c) The word "Director" when used herein shall have reference to the Director of Agriculture.

License—Application—Fee.] § 2. On and after August first, Nineteen Hundred and Nineteen, no person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit consignments or shipments for sale on commission within this State, any kind of farm produce, without a license as provided in this Act. Every person, firm, exchange, association and corporation in this State

receiving farm produce for sale on commission shall annually, on or before June 1st, file an application with the Director of Agriculuture for a license to do a commission business in farm produce. Such applicant shall state the kind or kinds of farm produce which the applicant proposes to handle, the full name of the person, firm, exchange, association or corporation applying for such a license, and if the applicant be a firm, exchange, corporation or association, the full name of each member of the firm, or the names of the officers of the exchange, association or corporation, and the name of the local agent of the exchange or association, and the city, town or village and street number at which the business is to be conducted. Such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business. The Director shall thereupon issue to such applicant, on payment of ten ($10) dollars and the execution and delivery of a bond as hereinafter provided, a license entitling the applicant to conduct the business of receiving and selling farm produce on commission at the place named in the application until the first day of July of the year next following. Seperate licenses and bonds shall be required for each location at which business is to be conducted; and such license shall be kept posted in the office of such licensee.

Applicant to Give Bond—Who May Bring Action.] § 3. Before any such license shall be issued every applicant shall execute and deliver to the Director of Agriculture an indemnity bond for five thousand ($5,000.00) dollars and with sureties satisfactory to the said Director. All bonds to be of a standard form as to terms and conditions, approved by the Director, and to secure an honest accounting and handling of produce received and for the payment to the consignor of all moneys or things of value received for goods consigned to such licensee for sale and to secure consignor against all fraudulent acts of said licensee in the sale or the handling of the goods of consignor. And the Director may bring an action in any court of competent jurisdiction in the county in which is situated the place of business of the licensee to recover payment for goods sold on commission and not paid to consignor, or not honestly accounted for, and for damages sustained by consignors by reason of such fraudulent acts and wrongful handling and if such licensee has become liable to more than one con-

signor, and the amount of the bond is insufficient to pay the entire liability, the consignors shall be compensated in proportion to their several claims, the said sums when collected to be promptly paid over to the parties entitled thereto. [As amended by Act approved June 29, 1927.]

Investigation—Notice of Hearing. § 4. The Director of Agriculure or his assistants shall have power to investigate, upon the verified complaint of an interested person, also to make an investigation irrespective of whether or not a complaint is filed, the record of any person, firm, exchange, corporation or association applying for a license, or any transaction involving the solicitation, receipt, sale or attempted sale of farm produce on a commission basis, the failure to make proper and true accounts and settlements at prompt and regular intervals, the making of false statements as to condition, quality or quantity of goods received or while in storage, the making of false statements as to market conditions, with intent to deceive, or the failure to make payment for goods received or other alleged injurious transactions; and for such purpose may examine at the place of business of the licensee, that portion of the ledgers, books of account, memoranda or other documents, relating to the transactions involved, of any commission merchant, and may take testimony therein under oath.

When a consignor of farm produce fails to obtain honest accounting in any transaction he shall within sixty (60) days after the shipment of the goods make a demand upon the consignee for either an honest accounting or payment for goods shipped. Ten days after making this demand, if an honest accounting or payment has not been received by the consignor, he shall file with the Director a copy of this demand together with an affiadvit setting forth the nature and amount of the goods consigned, the date of the consignment, and the amount he believes to be due and owing him, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee. The Director shall attempt to secure an explanation or adjustment; failing this, within seven days after receipt of such complaint from consignor, he shall cause a copy thereof, together with a notice of a time and place for a hearing on such complaint, to be served personally or by mail upon such commission merchant. Such service shall be made at least seven days before the hearing, which shall be held in the city, village or township in which is sit-

uated the place of business of the licensee. At the time and place appointed for such hearing, the Director or his assistants shall hear the parties to such complaint, shall have power to administer an oath, and shall enter in the office of the Director at Springfield, a decision either dismissing such complaint or specifying the facts which he deems established on such hearing, and in case such facts are established as cause him to revoke such license, he shall bring an action on the bond within sixty days of the filing of such decision. (As amended by Act approved June 29, 1927.)

Refusal or Revocation of License.] § 5. The Director may decline to grant a license or may revoke a license already granted where he is satisfied of the existence of the following cases or any of them.

(a) Where false charges have been imposed for handling or services rendered.

(b) Where there has been a failure to account promptly and properly or to make settlements, with intent to defraud.

(c) Where there have been false statements as to condition, quality or quantity of goods received or held for sale on commission when the same might be known on reasonable inspection.

(d) Where there has been false or misleading statement or statements as to market conditions with intent to deceive.

(e) Where there has been a combination or combinations to fix prices.

(f) Where the commission merchant directly or indirectly purchases the goods for his own account without prior authority therefor or without notifying the consignor thereof.

(g) Where the commission merchant is in bankruptcy or in insolvency, or where the Director has reason to believe that bankruptcy or insolvency may shortly occur.

(h) Where there has been a continued course of dealing of such a nature as to satisfy the Director of the inability to properly conduct the business of commission merchant, or of the intent to deceive or defraud shippers.

(i) Where a licensee has been guilty of fraud or deception in obtaining his license.

(j) Where the licensee neglects to file a new bond when

notified by the Director that the bond already filed is unsatisfactory.

Action Subject to Review.] § 6. The action of the Director in refusing to grant a license, or in revoking a license granted under this Act, shall be subject to review by a writ of certiorari, and if such proceedings are begun, until the final determination of the proceedings and all appeals therefrom, the license of such commission merchant shall be deemed to be in full force and effect, provided the fees for such license shall have been paid and a bond given as herein required.

Commission Merchants to Keep Record of Produce.] § 7. Every commission merchant shall, upon the receipt of farm produce, and as he handles and disposes of the same, make a record thereof, specifying the name and address of the consignor, the date of receipt, the kind and the quantity of such produce, the condition of the goods upon receipt by licensee, the amount of goods sold, the date of sale, the name and address of the person to whom the goods are sold, his license number where the same can be secured with reasonable diligence, the price received and the items of expense connected therewith; and a memeorandum of this record except as to the names and addresses of purchasers of such goods, together with payment in settlement for such shipment, shall be mailed to the consignor within forty-eight hours unless otherwise agreed. The commission merchant shall retain the foregoing record for a period of six months and the same shall be open to the inspection of the Director or his agents. The burden of proof shall be upon the commission merchant to prove the correctness of his records as to any transactions which may be questioned.

Penalty.] § 8. Any person, firm, exchange, association or corporation who shall receive or offer to receive, sell, or offer to sell on commission within this State any kind of farm produce without a license except as in this Act permitted and any person who being a commission merchant in farm produce shall (a) impose false charges for handling or services in connection with farm produce, or (b) fails to account for such farm produce promptly and properly and to make settlements thereof, with intent to defraud, or (c) shall make false or misleading statement or statements as to market conditions with intent to deceive, or, (d) enter into any combination or combinations to fix prices, or (e) directly or indirectly purchases for his or its own account,

goods received by him or it upon consignment without prior authority therefor from the consignor, or shall fail to promptly notify the consignor of such purchase on his or its own account, or (f) any person handling, shipping or selling farm produce who shall make false statements as to grade, condition, markings, quality or quantity of goods shipped, or packed in any manner, with intent to deceive, or (g) shall fail to comply in every respect herewith, or (h) shall advertise or hold one's self out as a commission merchant in farm produce without a license, shall be guilty of a misdemeanor, and punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars.

All fines imposed and collected under this Act shall be paid within thirty days after such collection to the Department of Agriculture and by it paid into the State treasury. (As amended by Act approved June 29, 1927.)

APPENDIX "B".

Federal Statute.

TEXT OF THE ACT.

[46 Stat. 531—71st Congress.]

An act to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when use in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(4) The term "perishable agricultural commodity" means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character;

(5) The term "commission merchant" means any person engaged in the business of receiving in interstete or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means any person engaged in the business of buying or selling in carloads any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect of sales of any such commodity of his own raising; and (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" in respect of any such commodity in any calendar year until his purchases of such commodity in carloads in such year are in excess of twenty. Any person not considered as a "dealer" under clauses (A) and (B) may elect

to secure a license under the provisions of section 3, and in such case and while the license is in effect such person shall be considered as a "dealer." As used in this paragraph, the term "in carloads" includes corresponding wholesale or jobbing quantities as defined for any such commodity by the Secretary;

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively;

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

UNFAIR CONDUCT.

SEC. 2. It shall be unlawful in or in connection with any transaction in interstate of foreign commerce—

(1) For any commission merchant or broker to make any fraudulent charge in respect of any perishable agricultural commodity received in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought or sold in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement concerning the condition, quality, quantity, or disposition of, or the condition of the market for, any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold or contracted to be bought or sold in such commerce by such dealer; or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such commodity to the person with whom such transaction is had;

(5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or the country in which such commodity was actually produced;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate under authority of any Federal or State inspector as to the grade of quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

LICENSES.

SEC. 3. (a) After the expiration of six months after the approval of this Act no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subdivision shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(b) Any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application. Upon the filing of the application, and annually thereafter, the applicant shall pay a fee of $10.

SEC. 4. (a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided in subdivision (b) of this section, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

(b) The Secretary shall refuse to issue a license to an applicant if after notice and hearing he finds (1) that the applicant has previously been responsible in whole or in part for any violation of the provisions of section 2 for which a license of the applicant, or the license of any partnership, association, or corporation in which the applicant held any office or, in the case of a partnership, had any share or interest, was revoked, or (2) in case the applicant is a partnership, association, or corporation, that any individual holding any office or, in the case of a partnership, having any interest or share in the applicant, had previously been responsible in whole or in part for any violation of the provisions of section 2 for which the license of such individual, or of any partnership, association, or corporation in which such person held any office, or, in the case of a partnership, had any share or interest, was revoked. Notwithstanding the foregoing provisions, the Secretary, in the case of such applicant, may issue a license if the applicant furnishes a bond or other satisfactory assurance that his business will be conducted in accordance with the provisions of this Act, but such license shall not be issued before the expiration of one year from the date of such revocation.

LIABILITY TO PERSON DAMAGED.

SEC. 5. (a) If any commission merchant, dealer, or broker violates any provision of paragraph (1), (2), (3), or (4) of section 2 he shall be liable to the persons or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now ex-

isting at common law or by statute, and the provisions of this Act are in addition to such remedies.

COMPLAINT AND INVESTIGATION.

SEC. 6. (a) Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.

(b) Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person, may file, in accordance with rules and regulations of the Secretary a complaint of any violation of any provision of section 2 by any commission merchant, dealer, or broker, and may request an investigation of such complaint by the Sercetary.

(c) If there appear to be, in the opinion of the Secretary, any reasonable grounds for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action, have said complaint served by registered mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the said person is engaged in business.

(d) After an opportunity for a hearing on a complaint the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section 2.

(e) In case complaint is made by a nonresident of the United States before any action is taken thereon, that the complainant shall be required to furnish a bond double the amount of the claim, the bond to be conditioned upon the payment of costs, including attorney's fees of respondents, in case of failure to sustain the case.

REPARATION ORDER.

SEC. 7. (a) If after a hearing on a complaint made by any person under section 6 the Secretary determines that the commission merchant, dealer, or broker has violated any provision of paragraph (1), (2), (3), or (4) of section 2, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order.

(b) If any commission merchant, dealer, or broker does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

SUSPENSION AND REVOCATION OF LICENSE.

SEC. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

ACCOUNTS AND RECORDS.

SEC 9. Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period of not to exceed ninety days.

EFFECTIVE DATE AND FINALITY OF ORDER.

SEC. 10. Any order of the Secretary under this Act other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.

INJUNCTIONS.

SEC. 11. For the purposes of this Act the provisions of all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the Interstate Commerce Commission are made applicable to orders of the Secretary under this Act and to any person subject to the provisions of this Act.

GENERAL PROVISIONS.

SEC. 12. The Secretary may report any violation of this Act for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and

expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 13. (a) In the investigation of complaints under this Act, the Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material for the determination of any such complaint. If any such commission merchant, dealer, or broker refuses to permit such inspection, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender until permission to make such inspection is given.

(b) The Secretary, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material for the determination of any complaint under this Act.

(c) In case of disobedience to a subpoena, the Secretary or any of his examiners may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of accounts, records, and memoranda. Any district court of the United States within the jurisdiction of which any hearing is carried on may, in case of contumacy or refusal to obey a subpoena isued to any person, issue an order requiring the person to appear before the Secretary or his examiner or to produce accounts, records, and memoranda if so ordered, or to give evidence touching any matter pertinent to any complaint; and any failure to obey such order of the court shall be punished by the court as a contempt thereof.

(d) The Secretary may order testimony to be taken by deposition in any proceeding or investigation or incident to any complaint pending under this Act at any stage thereof. Such depositions may be taken before any person designated by the Secretary and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce accounts, records, and memoranda in the same manner as witnesses may be compelled to appear and testify and produce

accounts, records, and memoranda before the Secretary or any of his examiners.

(e) Witnesses summoned before the Secretary or any officer or employee designated by him shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like service in the courts of the United States.

(f) No person shall be excused from attending, testifying, answering any lawful inquiry, or deposing, or from producing any documentary evidence, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this Act, or upon the taking of any deposition herein provided for, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, or produce evidence, documentary or otherwise, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, or upon the taking of any such deposition, or in any such cause of proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 14. The Secretary is hereby authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies, and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this Act, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to

cover the cost for the service rendered: *Provided,* That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further,* That expenses for travel and subsistence incured by inspectors shall be paid by the applicant for inspection to the disbursing clerk of the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this Act: *And provided further,* That certificates issued by such inspectors shall be received in all courts of the United States as prima facie evidence of the truth of the statements therein contained.

SEC. 15. The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act, and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing binding, telegrams, telephones, law books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and expenses, including reporting services, as shall be necessary to the administation of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto.

SEC. 16. In construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission

merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

SEPARABILITY.

SEC. 17. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SHORT TITLE.

SEC. 18. This Act may be cited as the "Perishable Agricultural Commodities Act, 1930."

Approved, June 10, 1930.